



222 Delaware Avenue • Suite 900
P.O. Box 25130 • Wilmington, DE • 19899
Zip Code For Deliveries 19801
www.bayardlaw.com

We are Living (and Dying) in a Digital World: Estate Planning in a Digital World

**Prepared By:
Trisha W. Hall
Bayard, PA**

1. Summary and Goals of Presentation.

- A. Email, social media, online bank accounts, online payment accounts and other forms of conducting our personal and business affairs are increasingly becoming the norm.
 - i. The ITU (International Telecommunication Union), the United Nations specialized agency for information and communication technologies, estimates that over 77% of the U.S. population has internet access. (<http://www.internetworldstats.com/am/us.htm>)
 - ii. The biggest increase in internet use since 2005 has been among seventy to seventy-five year olds. 45% of this group is now online. 24% of internet users in the generation born in 1936 or before now bank online. See Molly Wilkens, *Privacy and Security During Life, Access After Death: Are They Mutually Exclusive?*, 62.Hastings L. J., Vol. 1037 at 1055.
 - iii. 75% of employed adults in the U.S. have at least one personal email address, and 59% have at least one work email address. 20% of young adults have three or more email accounts. See *id.*
- B. Legislatures and estate planners are only beginning to grasp what this will mean when an online user becomes incapacitated or dies.
- C. With this presentation, we hope to identify the planning issues with an online presence, illustrate these issues through specific examples of several common types of online activity, outline the legislative responses to date, and provide some sample planning solutions or stop-gaps.

2. Identifying the Issues.

- A. Digital Assets and Accounts: What are they?
 - i. Digital Asset: emails, documents, images, audio, video and other types of files stored on electronic communication devices – desktops, laptops, tablets, peripherals, storage devices, mobile telephones, and smartphones.





- ii. Digital Account: email accounts, software licenses, social network accounts, social media accounts, file sharing accounts, financial management accounts, domain registration accounts, domain name service accounts, web hosting accounts, tax preparation service accounts, online stores, and affiliate programs.
- B. Executors, guardians, agents, and trustees of revocable trusts will need to identify, access, and control these assets and accounts, to:
- i. Protect the privacy of the incapacitated or deceased.
 - ii. Assess whether an asset or account has real-world value, and if so, whether it can be transferred.
 - iii. Memorialize the decedent or shut down the account.
 - iv. Prevent fraud or identity theft.
 - v. Obtain evidence for or comply with discovery in litigation.
- C. Issue 1: Discovering the asset or account and once discovered, accessing the asset or account, possibly without login and/or password and/or answers to security questions and/or encryption protecting the asset or account.
- D. Issue 2: User agreements, terms and conditions, and privacy policies control most issues and they are not consistent.
- E. Issue 3: Typically no language found in will, revocable trust, or power of attorney to authorize executor, trustee, or agent to act.
- F. Issue 4: No federal law on point. Very few states have laws addressing the issues and those that do are sufficiently broad in scope.
- G. Issue 5: Privacy laws may prohibit or make it illegal to access a digital asset or account without specific authority to do so (Gramm-Leach-Bliley Act of 1999, Right to Financial Privacy Act of 1978, and Electronic Communications Privacy Act of 1986) and state internet privacy laws (all 50 states have an internet privacy law.)



i. PA: 18 Pa. C.S.A. §§ 7601- 7616

(1) A person commits the offense of unlawful use of a computer if he: (1) accesses or exceeds authorization to access, ... any computer, computer system, computer network, computer software, computer program, computer database, World Wide Web site or telecommunication device or any part thereof with the intent to interrupt the normal functioning of a person or to devise or execute any scheme or artifice to defraud or deceive or control property or services by means of false or fraudulent pretenses, representations or promises; (2) intentionally and without authorization accesses or exceeds authorization to access, ... any computer, computer system, computer network, computer software, computer program, computer database, World Wide Web site or telecommunication device or any part thereof; or (3) intentionally or knowingly and without authorization gives or publishes a password, identifying code, personal identification number or other confidential information about a computer, computer system, computer network, computer database, World Wide Web site or telecommunication device. 18 Pa. C.S.A. § 7601(a).

ii. DE: 11 Del. C. § 932. Unauthorized access.

(1) A person is guilty of the computer crime of unauthorized access to a computer system when, knowing that the person is not authorized to do so, the person accesses or causes to be accessed any computer system without authorization.

(2) “Computer system” means a computer, its software, related equipment and communications facilities, if any, and includes computer networks. 11 Del. C. § 931(8).

(3) “Computer network” means: (a) A set of related devices connected to a computer by communications facilities; (b) A complex of 2 or more computers, including related devices, connected by communications facilities; or (c) The communications transmission facilities and devices used to interconnect computational equipment, along with control mechanisms associated thereto. 11 Del. C. § 931(4).

H. Issue 6: Determining whether an asset is transferable and if so, further determining its value and how to transfer it.

i. Could be further complicated with the development of web services designed to store digital account information, such as logins and passwords, that promise transfer the information to a designated “beneficiary.” See 5.C. below.

- ii. In a Michigan case, a father who was the personal representative of his late son's estate, sued Yahoo! to gain access to the son's email account to transfer his saved emails to the beneficiaries of the estate. Justin Ellsworth was serving in Iraq at the time of his death. He had communicated to his parents his desire to create a scrapbook of the emails he saved during the course of his two year deployment. Upon his death, not knowing his son's password to the account, his father contacted Yahoo! to gain access. Yahoo! refused on privacy grounds and Mr. Ellsworth sued. The Court granted access and Yahoo! complied without appealing the decision by releasing a CD of saved emails sent to Justin (but not those he had sent to others,) but maintained its right to maintain its users' privacy. See <http://www.justinellsworth.net/email/yahoofight.htm>

I. Issue 7: Stopping automatic payments.

3. Examples.

- A. Facebook: (Traditional social networking) 1 billion monthly active users as of September 2012. (<http://online.wsj.com/article/SB10000872396390443635404578036164027386112.html>)
 - i. User and Privacy Agreements: Member will not share password, let anyone else access the account, or do anything else that might jeopardize the security of the account.
 - ii. Anyone can report the death of member, and with proof of death, the member's account will be memorialized, meaning confirmed friends can see the member's timeline or locate it in search, but the timeline will no longer appear in the suggestions section of the home page. Friends and family can leave posts in remembrance.
 - iii. Verified immediate family members or an executor may request removal of an account so that no one can view it. Must have proof of authority. (FB does not guarantee that the account will be taken down.)
 - iv. Facebook will not grant any third party access to the account itself.
- B. LinkedIn: (Professional networking) As of March 22, 2011, 100 million professionals worldwide had LinkedIn accounts and this number was growing by about 1 million new members every week. (<http://blog.linkedin.com/2011/03/22/linkedin-100million/>)
 - i. User and Privacy Agreements: Member agrees to keep password confidential and not let others access account.
 - ii. Any person may notify LinkedIn of death of member through a "Verification of Death Form," at which time, LinkedIn may memorialize the account, meaning it may restrict profile access, remove messaging functionality, and close an account if it receives a formal request from the User's next of kin or other proper legal request to do so.
 - iii. Account will likely be under member's work email address and accessed only at work, so executor or family member may not be able to access.



- C. Shutterfly/Snapfish: (Photo storage and processing) Snapfish, by HP, is the #1 online photo service in the world, with more than 35 million members and more than 1.5 billion unique photos stored online. (http://www.hp.com/hpinfo/newsroom/press_kits/2007/ces/fs_dp_snapfish.pdf). Shutterfly, as of 2008, had 2.8 million transacting customers. (http://www.shutterfly.com/about/com_sub_facts.jsp).
- i. Snapfish does not detail in its terms and conditions, nor elsewhere on its site, restrictions on user accounts or what happens to an account in the event of a account holder's death.
 - ii. Shutterfly's terms and conditions specify that the account holder not disclose his or her user-name or password to any third party. Shutterfly also has a process for a family member or executor to access the account of a decedent.
- D. Google: (Email, document and spreadsheet creation and storage, social networking, other) As of June 2012, Google had 425 million active users worldwide. (<http://en.wikipedia.org/wiki/Gmail>) Based on the number of active users in January, it means about 15 million people are activating Google accounts per month. (<http://www.theberge.com/2012/6/28/3123643/gmail-425-million-total-users>)
- i. Google's privacy policy states that it may provide personal information about an account holder with the account holder's consent. It does not explicitly restrict the account holder from sharing account information with a third party.
 - ii. Google may authorize access to email after a person has passed away. The procedure is well-spelled out:

Accessing a deceased person's mail

If an individual has passed away and you need access to the contents of his or her email account, in rare cases we may be able to provide the Gmail account content to an authorized representative of the deceased user. We extend our condolences and appreciate your patience and understanding throughout this process.

At Google, we're keenly aware of the trust users place in us, and we take our responsibility to protect the privacy of people who use Google services very seriously. Any decision to provide the contents of a deceased user's email will be made only after a careful review, and the application to obtain email content is a lengthy process. Before you begin, please understand that Google may be unable to provide the Gmail account content, and sending a request or filing the required documentation does not guarantee that we will be able to assist you. If you are the authorized representative of a deceased user and wish to proceed with an application to obtain the contents of a deceased user's Gmail account, please carefully review the following information regarding our two stage process:



Part 1

We require the following information:

1. Your full name
2. Your physical mailing address
3. Your email address
4. A photocopy of your government-issued ID or driver's license
5. The Gmail address of the deceased user
6. The death certificate of the deceased user. If the document is not in English, please provide a certified English translation prepared by a competent translator and notarized
7. The following information from an email message that you have received at your email address, from the Gmail address in question:
 - o The full header from the email message. See instructions on how to find headers in Gmail and other webmail email providers. Copy everything from 'Delivered-To:' through the 'References:' line
 - o The entire content of the message

Mail or fax this information to:

Google Inc.

Gmail User Support - Decedents' Accounts

c/o Google Custodian of Records

1600 Amphitheatre Parkway

Mountain View, CA 94043

Fax: 650-644-0358

Part 2

Upon receipt of this information, Google will review your request and notify you by email as to whether or not we will be able to move beyond Part 1 to the next steps of the process. If we are able to move forward based on our preliminary review, we will send further instructions outlining Part 2. Part 2 will require you to get additional legal process including an order from a U.S. court and/or submitting additional materials. *Please note that submitting these materials will not guarantee that we will be able to provide Gmail content so we recommend not embarking on Part 2 until you hear back from us regarding Part 1.* Because of our concerns for user privacy, if we determine that we cannot provide the Gmail content, we will not be able to share further details about the account or discuss our decision.



- E. PayPal: (Online payment service) As of June 29, 2011, PayPal had 100 million active accounts. (<https://www.thepaypalblog.com/2011/06/paypal-crosses-first-100-million-active-accounts-4/>)
- i. PayPal expressly provides for account holders to authorize access to accounts to third parties:

If you grant express permission to a third party to take specific actions on your behalf, or access particular information about your Account, either through your use of the third party's product or service or through your Account Profile, you acknowledge that PayPal may disclose the information about your Account that is specifically authorized by you to this third party. You also acknowledge that granting permission to a third party to take specific actions on your behalf does not relieve you of any of your responsibilities under this Agreement. Further, you acknowledge and agree that you will not hold PayPal responsible for, and will indemnify PayPal from, any liability arising from the actions or inactions of this third party in connection with the permissions you grant. You may change or remove these permissions at any time by changing your settings in your Account Profile.
 - ii. Upon the death of an account holder, PayPal will close the account after receiving a faxed written request from a personal representative with documentation of death, copy of the will or short certificate with information about the executor and a copy of the executor's photo id.
 - iii. Any funds in a deceased account holder's account will be refunded by check to the account holder's name.
- F. Sony: (Online gaming system) Worldwide, Sony had approximately 90 million user accounts (not necessarily users) for its online gaming systems as of March 7, 2012. (<http://www.playstationlifestyle.net/2012/03/07/number-of-registered-playstation-network-accounts-reaches-90-million/>)
- i. User Agreement restricts disclosure of information required to access an account.
 - ii. Once a Sony Network account is created, it is never deleted. It can be removed from the computer system itself so that it is no longer viable.
 - iii. To prevent someone from accessing the account a person can notify Sony to do so by having it banned or suspended.
 - iv. Purchased content is not transferable between accounts.
 - v. Any funds remaining in the account are non-refundable and non-transferable.
- G. Apple ID: (iTunes, iPad and iPhone apps) As of March 2, 2011, Apple had announced it had over 200 million people with Apple accounts. (<http://techcrunch.com/2011/03/02/apple-200-million-itunes-accounts/>).



- i. User Agreement does not expressly prohibit the disclosure of account information.
- ii. An account may be disabled with continued access to purchased content by contacting Apple.
- iii. No specific content about the account after the death of the user.
- iv. iTunes was in the news recently for a purported lawsuit brought by actor Bruce Willis to allow his iTunes account to be transferred to his children upon his death. Later revealed to be a false claim, it shed a light on people's perceptions about their "ownership" over their digital accounts.

4. Legislative Responses.

A. To date, state statutes or pending legislation mostly address access to social networking and email accounts, but not other types of accounts. In addition, they typically only address access after death, and not upon incapacity.

B. Social Networking and Email Access

- i. Oklahoma §58-269. – effective November 1, 2010

The executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website or any e-mail service websites.

- ii. Nebraska – introduced by Legislative Bill 783 in January 2012 – pending further study:

Grants a personal representative the power to take control of, conduct, continue, or terminate any account of a deceased person on any social networking web site, microblogging or short message service web site, or email service web site.

- iii. Idaho – Idaho Code §§15-5-424 and 15-3-715 [only statute to authorize conservator of an incapacitated person with access]:

Grants the personal representative of an estate and the conservator of an incapacitated person's or minor's estate to take control of, conduct, continue, or terminate any account of a deceased person on any social networking web site, microblogging or short message service web site, or email service web site.

- iv. Connecticut and Rhode Island - Conn. St. Sec. 45a-334a. and R.I. Code 33-27-1 – 33-27-5 [limited to email accounts]:



Grants access to the executor or administrator of an estate access to or copies of the contents of the email account of the deceased person upon written request accompanied by a copy of the death certificate and certificate of appointment or upon order of the probate court.

C. More Comprehensive Legislation

i. Delaware – introduced by House Bill 396 in June 2012:

For digital assets and digital accounts (see definitions in 2.A. above), provides that service providers are to provide to the executor or administrator of an estate access to and control of digital assets, and the ability to take control of, conduct, continue, or terminate digital accounts upon receipt of (1) a written request for such accompanied by a death certificate and letters testamentary or letters of administration; or (2) an order of the Register of Wills or Court of Chancery.

D. In January 2012, the Uniform Law Commission approved a study committee on fiduciary power and authority to access digital assets and accounts which issued a project proposal in late May.

E. PA Representative Briggs from Montgomery County introduced a bill to the PA legislature in August 2012 that has been referred to the Judiciary Committee. PA House Bill 2580.

5. Proactive Planning Solutions

A. Inventory of Assets and Accounts

i. Sample Worksheet Attached

ii. Location of Inventory

- (1) Safe
- (2) Safe deposit box
- (3) Secure file cabinet
- (4) Electronically, saved behind login/password.

iii. Keeping Inventory Current

- (1) List should be updated whenever a change is made and on a regular basis.
- (2) For passwords that must be changed periodically, recommend an online password storage service (see 5.C below), or a password that is a basic formula the factors of which change with just the formula to be written down, e.g., birthdate/name of account/current age (for annual changes) or current month (for monthly changes) = 03011976google36 [this is not an actual password or formula], or a password that is a phrase, e.g., my google password is January 2012



B. Language in Will, Revocable Trust and Power of Attorney

i. Powers of Attorney:

Digital Assets and Accounts. To access, use, control, modify, delete and transfer digital devices (e.g., computers, tablets, peripherals, storage devices, mobile telephones, smartphones, etc.), digital assets (e.g., music, photographs, licenses, videos, currency, etc.) and digital accounts (e.g., email accounts, social media accounts, file sharing accounts, financial accounts, etc.) I may own or have a license to use, now or in the future.

ii. Wills and Revocable Trusts:

(1) Executor/Trustee Power:

Executor/Trustee shall have the power to access, use, and control any digital device that I may own or have license to use (e.g., computers, tablets, peripherals, storage devices, mobile telephones, smartphones, etc.) for the purpose of accessing, controlling, deleting, transferring, and distributing any digital asset and digital account that I may own or have license to use, to the extent then authorized by law. I specifically authorize Executor/Trustee to obtain any username, login, password or other electronic credential associated with any of my digital devices, digital assets and digital accounts.

(2) Definitions:

C. Online storage

i. Legacy Locker: <http://legacylocker.com/>

(1) Stores login and password information and copies of documents.

(A) Information and documents are encrypted so that even the provider cannot see it.

(2) For each account, a person can assign a beneficiary to the content.

(A) Only one beneficiary can be named.

(3) Accessible from any computer/mobile device.

(4) Named beneficiaries can access information after death.

(A) Upon notification of death, submission of death certificate, and confirmation by two previously identified “verifiers.”



(5) Three options for payment:

(A) Free – up to 3 accounts

(B) Monthly – Unlimited

(C) One-time fee - Unlimited

ii. LastPass: <http://lastpass.com/>

(1) Remembers login/password information for frequently used websites so that you only have to remember your LastPass login/password.

(2) Allows you to give or share account information with others.

(3) Free service with premium upgrade. Premium package includes ability to synch across multiple devices and not see ads.

iii. SecureSafe: <http://www.securesafe.com/en/>

(1) A Switzerland based company, SecureSafe boasts being the “Swiss bank for your digital assets.”

(2) In addition to storage passwords, will transfer digital assets to up to 20 beneficiaries, depending on the package selected. Assets that have not been assigned a beneficiary will be deleted. “Data inheritance” will commence by a pre-selected “Authorized Activator” who enters an activation code. When the code is entered, an email will be sent to the account owner and if he/she does not respond within a designated period of time (from minutes to months), the inheritance process will begin.

(3) Packages range from free (up to 50 passwords and 1 beneficiary, to unlimited passwords and 20 beneficiaries for \$12.90/month.)



Education:

B.A., Bryn Mawr College (1998)
J.D., University of Pittsburgh School of Law
(2001)

Bar Admissions:

Delaware (2004)
Pennsylvania (2001)

Memberships:

American Bar Association
Delaware Estate Planning Council
Delaware State Bar Association
Pennsylvania Bar Association
Society of Financial Services Professionals—
Greater Philadelphia

Articles:

- “Maximizing Value,” *Captive Review: Delaware Report 2011* (January 2011)

Recent Speaking Engagements:

- Bryn Mawr Trust Co., Harrisburg, *Advantages of Delaware Trusts*, January 2012
- Delaware Estate Planning Council, *Captive Insurance Companies*, March 2011
- Delaware Department of Insurance, *Captive Insurance: Innovative Captive Designs for Closely-Held Businesses*, January 2011
- Philadelphia Bar Association, Tax Section, *Captive Insurance Companies*, May 2011

Trisha W. Hall

Associate

Direct Phone: (302) 429-4225

Direct Fax: (302) 658-6395

Email: thall@bayardlaw.com

Trisha is an associate at Bayard. She focuses her practice in the areas of estate planning, estate and trust administration, and the representation of fiduciaries and beneficiaries. She is admitted to practice in Delaware and Pennsylvania.

Trisha advises clients on all aspects of estates and trusts, including wills, powers of attorney, probate and estate administration, and irrevocable trusts. She regularly represents individuals and families who are developing or revising their estate plans. She works closely with her clients’ advisors, including CPAs, financial planners, and insurance and investment advisors to provide comprehensive estate planning solutions.

Trisha is actively involved in the Delaware Estate Planning Council, the Delaware State Bar Association’s Estates & Trusts section, and the Trust Committee of the Delaware Bankers Association. She currently serves on the Board of Directors and as Past President for the Society of Financial Services Professionals, Greater Philadelphia Chapter. She is also a member of the marketing committee of the Delaware Captive Insurance Association.

Trisha is a published author and frequent speaker on issues and developments related to estate planning, most recently the use of captive insurance companies as part of a client’s overall estate plan. She has been recognized by *Super Lawyers* as a Pennsylvania Rising Star in 2007 and 2008 and as a Delaware Rising Star in 2012 in the area of estate planning and probate. In 2009, she was designated a Top Lawyer by *Main Line Today* in the area of trusts and estates. From 2003 to 2006, Trisha worked as in-house trust counsel for a trust company in Wilmington, Delaware that served professional advisors in a trust administration role.